

NINETY-FIRST SESSION

In re Pinto (No. 3)

Judgment No. 2074

The Administrative Tribunal,

Considering the third complaint filed by Mr Antonio Pinto against the International Telecommunication Union (ITU) on 31 August 2000, the ITU's reply of 20 October 2000 and Ms H.'s comments attached thereto, the complainant's rejoinder of 9 January 2001, the Union's surrejoinder of 14 February, the submissions provided by the ITU on 5 March at the Tribunal's request, the complainant's observations thereon of 15 March and the Union's comments of 23 March 2001 on those observations;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant's career is summed up in part in Judgment 1646 on his first complaint.

From 1 April 1997 to 28 February 1998, with an interruption of one month in October 1997, the complainant carried out the duties of acting Head of the Archives Service, for which he was granted a special post allowance at grade P.2. He also received a special post allowance from 1 July to 30 November 1998 to compensate him for additional responsibilities that he was given in his job, but without actually being assigned to the post of Head of the Archives Service.

That post was put up for competition on 6 October 1998. The complainant applied. On 25 January 1999 the deputy Chief of the Department of Common Services submitted to the acting Chief of the Personnel and Social Protection Department a list of five candidates. The complainant was not among them. However, he was placed on a short list of five drawn up by the Appointment and Promotion Board on 29 January 1999. In a memorandum of 17 March the Chief of Common Services recommended appointing Ms B. He indicated that another candidate, Ms H., also met the requirements but that in his view, the other three candidates were unsuitable. The staff of the Archives Service were informed orally on 12 May of Ms B.'s appointment. By a memorandum of 16 June the complainant sought confirmation of that appointment from the Chief of Common Services, who replied on 23 June that such information being confidential, he was transmitting the request to the Personnel Department. On the previous day, however, the complainant had asked the Secretary-General in a memorandum to reconsider the appointment. In the absence of a reply he appealed on 13 September to the Appeal Board. Ms B. having refused the offer, Ms H. was appointed to the post.

In its report of 21 December 1999, sent to the complainant on 11 January 2000, the Appeal Board recommended rejecting the appeal. It indicated that, among other documents, it had examined "the correspondence leading up to the memorandum of 29.3.94 [from the Chief of the Common Services Department to the complainant] (with the request that it be placed on his file) concerning his conduct vis à vis his supervisors". In a memorandum of 14 February 2000, denying any previous knowledge of the memorandum of 29 March 1994, the complainant asked the Chief of Personnel to send him a copy of it. In an e-mail message of 16 February 2000 the complainant told the Chairman of the Appeal Board that the former acting Chief of Personnel had informed him orally the previous day that he had twice advised the Secretary-General to select him for the post. Having received a copy of the memorandum requested, the complainant informed the Chief of Personnel in a memorandum of 6 March that he had never seen it before. He therefore wished it to be removed from his personnel file because it had no lawful

existence. He sent a copy of that memorandum to the Chairman of the Appeal Board. By a memorandum addressed to the Secretary-General on 8 March 2000, the Appeal Board asked the Personnel Department to clarify the acting Chief of Personnel's recommendations and the memorandum of 29 March 1994. On 23 March 2000 the Chief of Personnel supplied copies of the two recommendations and indicated that he was not in a position to affirm that the complainant had received the memorandum of 29 March 1994.

On 4 April 2000 the Appeal Board decided to re-examine the complainant's appeal in the light of these new facts. It drew up a list of the documents in the complainant's personnel file which could be of use in examining the appeal, but took into account only those whose existence could not be challenged. In its amended report, dated 7 April 2000, the Board recalled the Secretary-General's explanation that the complainant's candidacy had failed because of interpersonal problems in the course of his work, particularly with his colleagues. But, the Board noted, the problems had been only with his supervisors and were a long time ago. It found that the Chief of Common Services had based his recommendation mostly on inconclusive evidence about the complainant's interpersonal relations. It observed that the acting Chief of Personnel had based his two recommendations in favour of the complainant's appointment on the fact that his performance as acting Head of the Archives Service had been excellent; he had never been promoted since his recruitment in 1984; he was a national of a country which was not represented in the Professional category; and he had the necessary knowledge of the ITU to discharge the duties in question. The Board further observed that while the selection of Ms B., the original choice, had been unanimous, there was nothing to indicate unanimity in the case of Ms H., the candidate finally appointed. It found that proper practice had not been fully observed in compiling the complainant's personnel file, which contained inconsistencies. Its principal recommendation to the Secretary-General was that he reconsider his position about the appointment to the post "with a view to finding a solution to a situation which has persisted and in which subjectivity has prevailed to the detriment of the appellant". In the absence of a decision by the Secretary-General, the complainant challenges the implied rejection of his appeal.

B. In his submission, the complainant refers to the Appeal Board's amended report. He requests the Tribunal to "recommend to the Secretary-General of the ITU [his] appointment ... to the post of Head of Archives" or else to grant him 200,000 Swiss francs for the damage to his career. He also seeks 50,000 francs in moral damages, 15,000 francs in compensation for the stress caused him by the Appeal Board's first report, and 6,000 francs in costs. He requests that a time-limit be set for the execution of the judgment.

C. In its reply the ITU recalls that appointments are at the discretion of the executive head of an organisation and are subject to only limited review. Since the Tribunal may not order the appointment of a specific candidate, the complainant's claim to that effect is irreceivable.

The Union observes that his having acted as Head of the Archives Service confers no right of appointment to the post. The rating "very good" in his staff report of 22 May 1997 refers only to two months during which he discharged those duties, which is too short a period to assess whether he is suited to them in the long term. The ITU contends that the rule of preference for internal candidates or nationals of countries under-represented in the Union applies only in the event of equal qualifications, which was not the case here. It sees misappraisal of the facts in the Appeal Board's findings that the order of preference in the recommendations of the Chief of Common Services was not based only on professional criteria and that the appointment of Ms H. was not agreed on unanimously. In endorsing the arguments of the acting Chief of Personnel, the Board did not judge the professional qualifications of the complainant, but based itself on considerations of expediency related to his career. It thus proposed his appointment, not with a view to "securing for the Union the highest standards of efficiency, competence and integrity", as required by Regulation 4.1 of the Staff Regulations, but rather in order to "find a solution". Lastly, the memorandum of 29 March 1994 is not the only document in his file to reveal the complainant's difficulties with interpersonal relations.

In the comments that she supplied at the Tribunal's invitation Ms H. notes that preference may be given to a particular nationality only when other qualifications are equal. She submits that she is better qualified for the post than the complainant.

D. In his rejoinder the complainant alleges inconsistency on the part of the Administration. The deputy Chief of Common Services did not recommend including the complainant on the short list, yet it was he who recommended his temporary appointment as acting Head of the Archives Service. The complainant points out that he was put on the short list when the post was previously advertised, in 1992. Furthermore the Appointment and Promotion Board was unanimous about including him in the short list, and thus acknowledged his professional competence. The

complainant considers that the renewal of his "appointment" to the post of acting Head of the Archives Service amounts by implication to a favourable appraisal of his performance. He points to flaws in the assessment of his qualifications and confirms that the order of preference established by the Chief of Common Services was indeed based on considerations other than professional qualifications. He denies that there was unanimity about appointing Ms H.: the acting Chief of Personnel, who was among those who interviewed her, preferred to recommend the complainant.

Lastly, on 2 October 2000 the ITU informed the Head of the Archives Service that her appointment was being challenged. The next day the Head of the Library and Archives Service sent the complainant an e-mail message seeking very specific information about his qualifications, without explaining why. He suspects the ITU of wanting to use the information against him without his knowledge.

E. In its surrejoinder the ITU contends that there was no renewal of the complainant's "appointment" as acting Head of the Archives Service. He was paid a special post allowance from 1 July to 30 November 1998 because he took on additional responsibilities; however, it did not mean that he was acting Head of the Service. It rebuts the intentions ascribed to it by the complainant: it was well acquainted with his curriculum vitae and so had no need to "delegate" the Head of the Library and Archives Service to obtain that information.

F. At the Tribunal's request the ITU provided the documents listed by the Appeal Board during its second examination of the case.

G. In his observations on those documents the complainant endorses the analysis of the Appeal Board which has examined them. He contends that, in addition to the memorandum of 29 March 1994, several of the documents produced were not communicated to him and so have no lawful existence. He adds that some of them are immaterial to the present case and at times are even misleading.

H. In its comments on the complainant's observations the ITU recalls that the documents were those listed by the Appeal Board. It therefore expresses surprise at the complainant's assertion that some of them are unknown to him. As to their relevance, the ITU points out that it produced them at the Tribunal's request and has refrained from all comment on them.

CONSIDERATIONS

1. The complainant's career is summed up in part in Judgment 1646 (*in re Pinto*).

Having joined the ITU in 1984 he got a permanent appointment on 2 October 1987 at grade G.5. In 1996 he was assigned to the Archives Service. From 1 April 1997 to 28 February 1998, he discharged the duties of acting Head of that Service, which belongs to the Library and Archives Service of the Department of Common Services.

The post of Head of the Archives Service was put up for competition on 6 October 1998. The complainant applied.

On 25 January 1999 the deputy Chief of Common Services submitted to the acting Chief of the Personnel and Social Protection Department a list of five candidates which did not include the complainant.

The applications were referred to the Appointment and Promotion Board, which was to draw up a short list of suitable candidates for the Secretary-General. The Board produced a list on 29 January comprising the complainant, who was the only internal candidate, and four others including Ms B. and Ms H.

The Chief of Common Services formed a panel of three - himself, the Head of the Library and Archives Service and the acting Chief of Personnel - to prepare a recommendation for the Secretary-General. The panel examined the five applications selected by the Appointment and Promotion Board and interviewed the candidates.

In a reasoned report of 17 March 1999, the Chief of Common Services informed the Secretary-General that on the strength of the candidates' replies to questions put to them, the members of the panel unanimously recommended appointing Ms B. or, failing that, Ms H. However, none of the other three candidates were to be recommended. The Chief of Common Services added that he would advise the acting Chief of Personnel as to how the complainant could improve his interpersonal relations with the staff in his Service.

On 26 March the acting Chief of Personnel, in a communication addressed to the Secretary-General, recommended appointing the complainant.

Having heard at a meeting of 12 May 1999 that Ms B. had been selected, the complainant sought confirmation of her appointment, but to no avail. On 22 June 1999 he asked the Secretary-General to reconsider his decision not to appoint him, but got no reply to that request either.

Even though on 2 June 1999 the acting Chief of Personnel again recommended the complainant, the Secretary-General endorsed the proposal made by the Chief of Common Services and appointed Ms H., Ms B. having refused the offer in the meantime.

Since the Secretary-General had still not answered the request to reconsider the decision not to appoint the complainant, the latter lodged an appeal with the Appeal Board on 13 September 1999.

In a report of 21 December 1999 the Board recommended the Secretary-General to reject the appeal. The report was sent to the complainant, with the indication that he would receive a final decision from the Secretary-General in the near future. However, no formal decision was issued.

After consulting the documents cited in the report, the complainant went back to the Appeal Board, to which he submitted a number of documents. The Board decided to reopen the case. On 7 April 2000 it issued an amended report in which it recommended allowing the appeal.

The Secretary-General has not issued a formal decision.

2. The complainant is asking the Tribunal to "recommend" his appointment to the post of Head of the Archives Service or else to grant him 200,000 Swiss francs for the harm done to his career. He also claims 50,000 francs in moral damages, citing in particular the accusation that he did not get on with his colleagues, which he deems libellous; 15,000 francs for the stress caused by the Appeal Board's first report; and 6,000 francs in costs. He also asks the Tribunal to set a time-limit for the execution of the judgment.

The ITU seeks dismissal of the complaint.

In observations submitted at the Tribunal's request, Ms H. states that she is better qualified than the complainant and contends that there was nothing unlawful about her appointment.

3. Lack of substantiation is not one of the complainant's pleas. During the appeal procedure the Secretary-General expressly confirmed his rejection of the complainant's candidacy and gave the reasons for it, so the complainant had every opportunity to comment on them. His right to be heard was thus respected.

The same is true for Ms H., whose appointment the complainant is challenging by implication. If the complaint were to succeed the decision to appoint her would be set aside and her position in law would change, to her detriment. It is therefore only right that she has been given the opportunity to have her say.

4. Whether or not to appoint someone is a discretionary decision taken by the appointing authority. A steady line of precedent has it that such a decision is subject to only limited review and that the Tribunal will not set it aside unless it is *ultra vires*, or shows some formal or procedural flaw, or a mistake of fact or of law, or some essential fact has been overlooked, or there is misuse of authority, or an obviously wrong inference has been drawn from the evidence (see, for example, Judgment 2020, *in re* Brillat, under 3, and the other cases cited therein).

5. The complainant cites contradictions in the proposals submitted to the Secretary-General. He points out that, contrary to the indications of the Chief of Common Services, the panel's proposal was not unanimous, since one of its members, the acting Chief of Personnel, submitted different proposals to the Secretary-General.

The Tribunal observes that since the acting Chief of Personnel received a copy of the report by the Chief of Common Services, it may be assumed that he would have reacted had he found it to be wrong. It is quite possible that he initially agreed to the proposals submitted to the Secretary-General by the Chief of Common Services, then changed his mind and made a different proposal in a personal capacity. Be that as it may, the Secretary-General received two proposals and was able to take them into account, so the differences cited were not such as to

invalidate his decision.

However, the wording of the memorandum sent by the Chief of Common Services to the Secretary-General setting out the panel's proposal to appoint Ms B., is not such as to allow the Tribunal to declare with certainty that the subsidiary proposal, to appoint Ms H. and reject the three other candidates, was also unanimous.

6. As to the memorandum of 29 March 1994 in which the Chief of Common Services rebuked him for insubordination, the complainant claims that he never received it, yet it was in his personnel file, which had been made available to the panel responsible for proposing an appointment.

The Union emphasises that, as the rules require, copies of communications sent to the complainant were placed in his file without the Personnel Department necessarily so informing him. The Union does not know whether the memorandum of 29 March 1994 was actually sent to the complainant, but the Personnel Department received a copy and "legitimately" placed it in his file.

The burden of proving that a document was actually received by its addressee lies with the party which cites it in evidence. That rule also applies to the copies in the complainant's personnel file of the documents allegedly sent to him. Since the Union has not proved that the memorandum was actually sent to its addressee, it may not be taken into account.

However, even before the implied rejection the Secretary-General knew from the Appeal Board's amended report and the evidence on file that the complainant denied having received the memorandum and that the Administration had failed to prove the contrary. In other words the complainant had had ample opportunity to make his position known, and it was clear even before the implied rejection that the memorandum could not be cited against him. Consequently, the evidence was not distorted.

7. In essence, the complainant's contention is that the decision rested on grounds that were wrong in fact and in law. He cites in particular the conclusions reached by the Appeal Board in its amended report, arguing that since he was equally well qualified as the two candidates who were successively selected for the post he ought to have been given preference, especially because he was the only internal candidate and because of his nationality, there being no Bolivians in the Professional category. He contends that, in actual fact, his application was discarded not for professional reasons, but because he was said not to get on with his colleagues, an allegation he categorically denies. Moreover, on the strength of his personnel file the Appeal Board noted that his difficulties had been only with his supervisors and were a thing of the past.

The ITU demurs. It denies that the Secretary-General's decision exceeded his discretionary power of appointment. The sole aim was to appoint the candidate best qualified for the post, and the two candidates who were successively selected were better qualified than the complainant. Accordingly, there was no need to resort to the secondary criteria applied where candidates are on a par, such as the fact of being an internal applicant or of a particular nationality.

Since the decision was an implied one, the reasons for it were not stated. However, they are indicated in the Secretary-General's reply to the Appeal Board and the Union's reply to this complaint.

It is plain from those reasons that the appointing authority based its decision first and foremost on purely professional qualifications, but also took into account the complainant's character and the difficulties he had in his working relations.

In its reply to the complaint, the ITU confirms all the reasons given in the reply to the Appeal Board, in which the Secretary-General said:

"Notwithstanding ... the complainant's professional competence as a librarian-archivist, it has to be noted ... that his personnel file, and particularly his staff reports contain many references to the communication problems experienced in working relations, particularly with his colleagues. Consequently, the official responsible for Common Services, who as such was in charge of recruitment to the post, cannot be criticised for having taken into account all the documents in the complainant's administrative file in reaching a decision as to which candidate to recommend. Furthermore, these documents being a part of the administrative file, the complainant has already had the opportunity to make known his position on them, contrary to his assertion in his submissions. The 'fundamental right to express one's views' referred to by the complainant is available to him each year when his staff reports are

drawn up."

The document demonstrates that the complainant's character, as revealed by his personnel file, did play a role in the appointing authority's decision. The differences within the Administration concerning the complainant's application are also evidence of that fact. The deputy Chief of Common Services was from the start opposed to his appointment, since the short list he proposed to the Appointment and Promotion Board did not include the complainant. The Board itself selected five candidates, including the complainant. The Chief of Common Services proposed to the Secretary-General the appointment of Ms B. or, failing that Ms H., and specifically excluded the other three candidates. The acting Chief of Personnel, however, was of the opinion that the complainant should not be discarded and had even proposed that the Secretary-General appoint him to the post. In the end the Secretary-General endorsed the proposal of the Department concerned, that is the Common Services, in the belief that its Chief could not be accused of not having taken all the facts into consideration. The Board of Appeal, after reaching the opposite conclusion in its initial report, found in its amended report that the Chief of Common Services' decision against recommending the complainant was based not only on professional considerations, but also on his interpersonal relations. In the case which gave rise to Judgment 1646, the Union already cited the complainant's difficulties in his relations with colleagues as a reason for not accepting his application.

The Appeal Board's amended report also shows that, in the Union's statement of reasons, the complainant's difficulties with interpersonal relations were taken into account, as they were referred to frequently in his personnel file.

According to the complainant and the Appeal Board, his personnel file affords no grounds for drawing unfavourable conclusions about his relations with his colleagues, but reveals only earlier difficulties he had with his supervisors. What needs to be ascertained, therefore, is whether the decision was flawed on this point by some mistake of fact.

8. The Union argues that the list drawn up by the Appeal Board concerning the documents in the complainant's personnel file shows the "existence of several exchanges of various sorts of messages commenting on the complainant's attitude, which made relations with other employees in his service or related services difficult".

In its initial report, the Appeal Board found that the personnel reports in the complainant's file revealed problems only in the relatively distant past and only with his supervisors. In its amended report, the Board considered that its first report was no longer valid and discussed new evidence provided by the parties. With regard to his personnel file, it noted in particular that "there is an inconsistency between the appraisals (good and even excellent) in [the] staff reports and the impression gleaned from correspondence ... relating to the periods in question". The Appeal Board concluded in particular that "the reasons for the order of preference in the recommendation by the Chief of the Common Services Department were based not only on professional criteria, but also on relational criteria which are not fully conclusive, notwithstanding the memorandum" of 29 March 1994. The Board also indicates that the relational problems were prior to the period when the complainant assumed the duties of acting Head of the Archives Service.

9. At the Tribunal's request the Union produced the documents cited. They largely bear out the ITU's assertions. They show that, during his long period of service in the library, his supervisors complained regularly, as from 1984-1985, of his rigid character, which made his relations with them difficult. For example he had difficulty in accepting some of their instructions and, often, their authority. It also hampered relations with his colleagues. The remarks made to him on the subject appear not to have had any lasting effect. It should be noted that his annual staff reports for the three years from 1 May 1990 to 30 April 1993 contain no remarks; however, those three reports had been kept by his supervisor before being finalised, and were then signed by him without comment. But negative comments again emerged in the report for the following year and in the letters exchanged in 1994 and 1995. A memorandum of 30 October 1995 from the Chief of Common Services to the Chief of Personnel envisages the complainant's transfer from the Library to the Archives Service by 1 January 1996 at the latest and recalls his persistent problems in the Library. The single report covering the period from 1 May 1994 to 30 April 1997 rates him as "very good" on all points with no further comment.

Covering a period of over ten years, those observations gave the Secretary-General grounds for concluding that the complainant's character was such as to raise serious doubts about his aptitude to discharge the duties of Head of the Archives Service. That conclusion, based on documents in his file and the recommendation of the Chief of Common Services, who knew the complainant, is founded on objective evidence.

10. Consequently, the Secretary-General was not guilty of bias when, having considered the applicants' professional and personal aptitudes, he found the two candidates who were successively selected for the post more apt than the complainant to perform the duties of the post.

That being so, there is no need to pursue further the question of whether, in purely professional terms, they were more competent than he.

11. The complainant claims the right of preference which is accorded, when candidates are equally competent, to internal applicants and to nationals of a State which is under-represented.

In view of its objective, which is to secure the best possible employees for an organisation, equality of competence applies to all the abilities required of an employee, both professional and personal.

The Secretary-General did not overstep his discretionary authority by concluding that the overall aptitude of the candidates was not equal. The plea must therefore fail.

12. Since his main claim fails, so too must the others. The complainant suffered no unlawful injury to his career, since he did not meet all the requirements for appointment. Furthermore, the ITU could not have impaired his dignity by mentioning his difficulties with fellow employees, since they were recorded in the dossier. Lastly, he may not complain about the consequences of an internal appeal procedure which he initiated and which did not succeed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 9 May 2001, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2001.

(Signed)

Michel Gentot

Jean-François Egli

Seydou Ba

Catherine Comtet